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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. ...793

EMIL SARKIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on December 27, 1957.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, pp. 17 to 34), is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 27, 1957 (Appendix, infra, p. 35). A timely petition for rehearing was filed by petitioner, and this petition was overruled on January 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

Petitioner's tax returns were being investigated by an internal revenue agent. The agent was offered a bribe by petitioner's accountant. The agent in attempting to obtain evidence to link petitioner to the wrongdoing telephoned petitioner and said the accountant "didn't get an o. k. to release that money." When petitioner replied "that what?" the agent asked if petitioner was going to call the accountant, and petitioner said he would call him. Subsequently the accountant contacted the agent and paid the bribe. The court below used this conversation to link petitioner to the wrongdoing as an aider and abettor and a conspirator, and as a basis for admitting into evidence against him the extra-judicial statements of his co-defendants. The questions presented are:

(1) Whether the above conversation constitutes sufficient proof of knowledge and participation so as to find one guilty of aiding and abetting and conspiring to bribe a federal agent.

(2) Whether the fact that petitioner's tax returns were under investigation warrants an assumption that the bribe was to his benefit so as to allow this assumption to be considered as an element in the proof of the requisite knowledge and participation.

(3) Whether the above conversation independently proves the offenses charged and petitioner's participation therein so as to make admissible in evidence against petitioner the extra-judicial statements of the co-defendants.

(4) Whether the defense of entrapment bars a conviction when the only evidence linking petitioner to the offenses charged is induced by a government agent seeking to connect petitioner to the proscribed activity, and there is an absence of any evidence showing any excuse for the inducement.

STATUTES INVOLVED.

18 U. S. C. A. 2 (a) and 2 (b), as amended by the Act of October 31, 1951, 65 Stat. 717, reads as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

18 U. S. C. A. 371 reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U. S. C. A. 201 reads as follows:

Whoever promises, offers or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

This section shall not apply to violations of section 212 of this title.

STATEMENT.

Petitioner was convicted in two counts of a three count indictment which charged him with having aided and abetted in bribing and with conspiracy to bribe an Internal Revenue Agent (R. 113).

The government's evidence may be summarized as follows:

Internal Revenue Agent Brown was assigned the tax return of petitioner for investigation (R. 13). Brown contacted petitioner and on November 2nd, 1954 petitioner Brown and petitioner's accountant, Mr. Ben Moran, held a conference in Brown's office (R. 17). On November 4th, Agent Brown accompanied by petitioner examined petitioner's safe deposit box (R. 18).

On February 1, 1955, Brown was advised by defendant Marbs, an accountant, that he was to represent petitioner in his tax matter, and asked what would be necessary to bring the examination to a hurried close. Brown replied that anything pertinent to the tax items plus signed net worth statements by the taxpayer would be helpful (R. 18, 19).

On March 3rd Agent Brown was approached by defendant Schulze who told Brown that Marbs had inquired as to the possibility of closing the case by accepting the return as filed and Schulze further stated "I asked Ollie [Marbs] what was in it for Brown, and he said five hundred." Schulze further stated to Brown "Five hundred dollars would make a nice down payment on a new automobile, ought to think it over" (R. 21).

On March 14, 1955 Brown reported the above incident with Mr. Schulze to Mr. Brown's supervisor. The matter was then taken up with the Intelligence Division (R. 21).

On March 22, 1955 Brown was again approached by Schulze who asked if he had given further consideration to the matter. Schulze stated to Brown that he (Schulze) was not going to have anything more to do with the transaction and that if Marbs wished to pursue it further he would have Marbs call Brown at a later time (R. 22).

On May 16, 1955 Brown called petitioner and was unable to reach him. Later the same day petitioner returned Brown's call. Brown asked whether Moran or Marbs was to represent petitioner and petitioner replied either:

> "Who is that?" (R. 34) or "Who is Marbs?" (R. 39).

Brown said he thought Moran or Marbs was to represent petitioner and petitioner said he would let Brown know (R. 34).

On May 17, 1955 Marbs called Brown, and informed him that he was to represent petitioner (R. 22, 24).

On May 20, 1955 Marbs again called Brown and Brown stated that in view of the fact that petitioner had been accompanied at the interview by Mr. Moran, he wanted to know definitely who was to represent petitioner. Marbs called back stating that he had conferred with petitioner and that he, Marbs, was to represent him. Brown and Marbs then made an appointment to meet on May 24th (R. 24, 25).

On May 24th Brown and Marbs met and Marbs stated to Brown that although he was representing both petitioner and Ray Sarkis, at present he was desirous of closing only the case of Emil Sarkis. Brown stated to Marbs that he could probably arrange a no change report if he so desired (R. 26). Brown was told by Marbs that the money had been placed in a safe of a friend of Marbs and peti-

tioner and that when Brown mailed the no change letter to petitioner, petitioner would call this friend and he in turn would call Marbs to pick up the money and turn it over to Brown (R. 26).

Later, on May 24th, Brown attempted to call Marbs at his office and found that he was not in. He then called petitioner but did not reach him (R. 27).

On May 25th Marbs called Brown and Brown told Marbs that he had recommended a no change report and that he had requested the report be returned to him (Brown) rather than mailed to the taxpayer. Brown stated to Marbs that in this way he could affect a simultaneous exchange of the no change report for the money. Marbs stated to Brown that he would discuss this with petitioner and that Brown should call him back that evening (R. 27).

That evening Brown called Marbs from a telephone booth in O'Fallon, Illinois; Mr. Alumbaugh of the Internal Revenue Department was in the phone booth with him listening to the conversation. In this conversation Marbs stated that he had talked to petitioner by phone and was to meet petitioner at nine o'clock the next morning, would meet Brown at ten o'clock (R. 27, 28).

The next morning Marbs stated to Brown that he had not been able to speak with petitioner as yet. In response to Brown's inquiry, concerning the amount of money, Marbs stated that the amount to be involved was five hundred dollars (R. 28).

On June 2nd Brown called Marbs and told Marbs that if petitioner would personally call Brown and advise Brown that he wanted the no change report mailed that he (Brown) would do so (R. 28, 29).

The same afternoon Marbs called back and stated that petitioner felt this was not in accordance with the agreement and that Brown was to mail the report (R. 29).

On June 3rd Brown called Marbs again and stated that if petitioner wanted the no change report mailed he would drop it in a mail box designated by Marbs and he (Brown) would meet Marbs there and collect the money as he mailed the no change report. Marbs stated to Brown that he would discuss this with petitioner (R. 29).

On June 7th Brown again called Marbs and Marbs stated that petitioner was not happy with Brown's proposal and that petitioner wanted the no change report mailed as agreed. That afternoon Brown again called Marbs and advised him that he would place the no change report in the mail and that petitioner would receive it the next day. Brown then proceeded to deposit the no change report in the mail (R. 29).

Brown talked with Marbs on June 8th and 9th by telephone and Marbs stated that he had not been in contact with petitioner. On June 10th Brown called Marbs and advised him that unless he received the money by the following Monday, June 13th, that he was going to conduct a real examination of the tax returns involved. Marbs told Brown that he had been unable to contact petitioner but that he was sure he could contact him over the weekend (R. 29, 30).

On June 13th Marbs called Brown and stated that petitioner had been out of town and that he was now back. He stated that he had been unable to contact petitioner but if Brown would call petitioner then petitioner would in turn call Marbs. Marbs stated to Brown that petitioner upon receipt of Brown's call would then call Marbs and give him an "o. k." (R. 30).

Brown then called petitioner but he was not in. Later petitioner returned Brown's call and the following occurred:

Brown: Brown speaking.
Party Calling: Hello. Mr. Brown?
Brown: Yes.
Party Calling: This is Sarkis.
Brown: Emil?
Party Calling: Yes, sir.
Brown: How are you?
Party Calling: All right. How are you?
Brown: I was just wondering, did you ever get that no change letter? I mailed that.
Party Calling: Yes, I got it a couple of days ago, Mr. Brown.
Brown: I talked to Marbs. He didn't get an O. K. to release that money.
Party Calling: That what?
Brown: I thought—were you going to call Marbs?
Party Calling: I'll get ahold of Marbs. I'll see what he—I'll talk to him.
Brown: O. K. Then you'll call Marbs?
Party Calling: Right. Is he home now?
Brown: I talked to Marbs about fifteen, twenty minutes ago, I think. He was at home.
Party Calling: O. K. I'll call him there.
Brown: All right.
Party Calling: Fine (R. 60).

Later that afternoon Marbs called Brown and stated that he would call Brown the following morning. On June 14th Marbs called Brown and made arrangements to meet him at about 11:15 A. M. at which time Brown and Marbs met and Marbs handed Brown an envelope containing $400.00 in United States currency. Brown testified that Marbs stated the other $100.00 would be paid to him later.

Brown asked about the examination of Raymond Sarkis and Marbs said the same deal could probably be worked out (R. 32, 33).

(All of the above conversations between Brown and Marbs, Brown and petitioner and Brown and Schulze were testified to by Brown. Several of the conversations were monitored and there was testimony corroborating Brown on these monitored conversations (R. 50-61, 83-86).

Brown did not discuss any matters concerning the investigation being conducted when Marbs and petitioner were together (R. 39). At no time did petitioner tell Brown that Marbs was to represent him (R. 49).

At no time did petitioner tell Brown that he would get any money and at no time did petitioner have any discussion with Brown about money (R. 49).

At the time Brown obtained the money from Marbs, he was under surveillance by prearrangement with various members of the Internal Revenue Service who saw the transfer of the envelope from Marbs to Brown and later saw the currency enclosed in the envelope (R. 62-67).

REASONS FOR GRANTING THE WRIT.

Petitioner stands in the position occupied by thousands of persons in this country, the position being that of a taxpayer represented by an attorney or accountant in matters with the Bureau of Internal Revenue. On the basis of a bribe paid to a revenue agent by Petitioner's accountant, petitioner has been convicted as an aider and abettor and a conspirator.

(1) Although there is no direct evidence on the point, it would seem warranted to infer from the record that Marbs

was the accountant representing petitioner. Beyond this point, however, the evidence is insufficient to link petitioner to the criminal act in any way.

The arrangements for the bribe were not participated in by the petitioner nor is there any evidence to show his knowledge of these arrangements. Revenue agent Brown in one of his two telephone conversations stated to petitioner that Marbs, "• • • didn't get an O. K. to release that money" (R. 60). The court below in considering this conversation stated:

> "Sarkis made no protest with reference to the money transaction but instead said, 'I'll get ahold of Marbs,' "

and also:

> "When Sarkis was questioned by Brown with reference to the payment of money promised by Marbs his reaction was not one of repudiation, but he said he would get ahold of Marbs. This, in effect, was a ratification of Marbs' acts rather than a repudiation, and it is significant that Marbs proceeded to carry out the scheme of bribery of which Sarkis had been given notice by Brown."

An examination of the record and the statement of the case in the opinion rendered by the court below indicates the crucial phase of the conversation under consideration in which petitioner returned Brown's call was as follows:

> "• • • Brown: I was just wondering, did you ever get that 'No Change' letter? I mailed that.
>
> Party Calling [Petitioner]: Yes, I got it a couple of days ago, Mr. Brown.
>
> Brown: I talked to Marbs. He didn't get an O. K. to release that money.
>
> Party Calling: That what?

Brown: I thought—were you going to call Marbs?
Party Calling: I'll get ahold of Marbs. I'll see what he—I'll talk to him.

* * * * * * * *" (R. 60).

It is obvious from the above that petitioner did not volunteer to contact Marbs when the money was mentioned. He said he would contact Marbs only after Brown suggested it Petitioner was either surprised by the mention of money by Brown or he didn't hear him as he replied: "That what?" Certainly, this is not a ratification of the acts of Marbs or a failure to protest as indicated by the court below. To say petitioner volunteered to call Marbs when "money" was mentioned is to ignore the facts appearing in the record.

Knowledge as well as participation are necessary elements in a charge of aiding and abetting or conspiracy. **Direct Sales Co. v. United States**, 319 U. S. 703; **United States v. Falcone**, 311 U. S. 205; **Nye & Nissen v. United States**, 336 U. S. 613. The requisite knowledge is found by the court below in the conversation in which Brown mentioned money. The court held also that participation could be reasonably inferred from the record. To find knowledge and participation from this conversation requires the piling of inference on inference in order to conclude that petitioner called Marbs, told him to pay the bribe, provided the funds and that as a result Marbs paid the bribe. This Court has condemned such procedure in **Direct Sales Co. v. United States**, supra.

(2) The court below emphasizes the fact that it was petitioner's tax return under investigation and that the bribe was to aid him in clearing him of tax liability. This benefit to petitioner is used by the court below to bring petitioner within the criminal scheme. It is noticed from the record, however, that no benefit to petitioner is shown.

The government offered no evidence to show that petitioner was not in fact entitled to the "no change" report mailed by Brown. The court below merely assumes the benefit since petitioner's tax return was being investigated. Such an assumption places every taxpayer in the position of being criminally responsible for any act performed by an accountant or attorney employed by him. The mere fact that a taxpayer's return is being investigated should not of itself be sufficient to sustain a conviction where his accountant offers or pays a bribe to an internal revenue agent. It is a fundamental of criminal law that criminal responsibility is personal. It is completely feasible to find an unscrupulous accountant or attorney using part of his fee, unknown to his client, to bribe an agent rather than become engaged in the extensive work involved in contesting a tax claim. The ruling of the court below is tantamount to making every taxpayer an insurer of the integrity of his accountant or attorney.

The attitude of the court below is illustrated by its treatment of one point in the instant case. The record discloses that agent Brown testified that on November 2, 1954, he asked petitioner for permission to examine his safe deposit box and petitioner agreed, and two days later the box was examined (R. 17-18). The record offers nothing further with respect to the safe deposit box. The court below, however, found that the request to examine the box showed petitioner that his returns "were being seriously investigated" and further, "after a two-day delay Brown examined the contents of the box, with what result is not disclosed by the record but the two days elapsing between the request and the examination, **of course**, gave ample opportunity to remove from the box anything of an incriminating nature." (Emphasis added.) The record is silent as to whether Brown or the petitioner suggested November 4 as the date of the examination, but the court below assumes "of course" that the delay was to permit

removal of incriminatory matter. Such an assumption like the assumption of benefit to petitioner, is in effect shifting the burden of proof to the petitioner inasmuch as the government had offered no evidence to show petitioner had requested the delay or that he had visited his box in the two-day period.

(3) The court below also ruled that the above factors (i. e., the conversation with Brown wherein money was mentioned) constituted sufficient proof of the offenses charged to authorize the introduction of the extra-judicial statements of the other defendants against petitioner. For the same reasons as set forth above, petitioner contends that the evidence did not independently prove the conspiracy so as to authorize the introduction of these extra-judicial statements. **Glasser v. United States**, 315 U. S. 60.

(4) The facts as found by the court below warranted petitioner's acquittal on the grounds of entrapment. The court below, as indicated, places great weight on the conversation between Brown and petitioner in which money was mentioned. The court holds that it is significant that after this conversation "Marbs proceeded to carry out the scheme of bribery of which Sarkis had been given notice by Brown." Even if it is reasonable to infer that subsequent to this conversation petitioner did contact Marbs and as a result thereof the scheme of bribery was carried out, it must be noticed that this course of action originated with the government and not with petitioner. Brown had called petitioner and left word for him to call back since petitioner was not in (R. 30-31, 60). When Brown called petitioner and again when petitioner returned the call, Brown was not conducting himself merely as an agent working on a tax file. In both calls a government stenographer was present to record the conversations which were subsequently introduced into evidence at the trial (R. 32, 52, 60). Brown was the party to raise the

subject of "money" and after the reply "that what?", Brown was the one who suggested petitioner contact Marbs (R. 60). If, as indicated by the court below, this conversation constitutes the basis for linking petitioner to the criminal scheme, it is obvious that any criminality on the part of petitioner was induced by the government agent, Brown. In the absence of any evidence by the government to show an excuse for the inducement or to show that petitioner independently sought or desired to achieve an illegal goal free from government inducement, he becomes a victim of entrapment by the government.

The call in question was, as well as the subjects "money" and "contacting Marbs," initiated by the government. The monitoring of the call is further evidence of the effort made by the government not only to entrap petitioner, but to secure evidence against him. There is no evidence to show that petitioner initiated any criminal scheme and that the government merely cooperated with him in the scheme. The evidence clearly shows initiation on the part of the government with respect to petitioner.

In view of the ruling of this Court on the question of entrapment in **Sorrells v. United States**, 287 U. S. 435, and in view of the fact that **Masciale v. United States**, 2 Cir., 236 F. 2d 601, cert. granted 352 U. S. 1000 (No. 84, October Term, 1957), and **Sherman v. United States**, 2 Cir., 240 F. 2d 949, cert. granted 353 U. S. 935 (No. 87, October Term, 1957), are now pending before this court on this issue, it is contended by petitioner that this court should grant certiorari in the instant case so as to clarify the law on entrapment for the lower courts of the country.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,735.

Oliver Marbs, Appellant, vs. United States of America, Appellee.		Appeal from the United States District Court for the Eastern District of Missouri.

No. 15,736.

Emil Sarkis, Appellant, vs. United States of America, Appellee.		Appeal from the United States District Court for the Eastern District of Missouri.

[December 27, 1957.]

Merle L. Silverstein (Rosenblum and Goldenhersh were with him on the brief) for Appellant Oliver Marbs.

Norman S. London (Mark M. Hennelly was with him on the brief) for Appellant Emil Sarkis.

John A. Newton, Assistant United States Attorney (Harry Richards, United States Attorney, Wayne H. Bigler, Jr., and Robert E. Brauer, Assistant United States Attorneys, were with him on the brief) for Appellee.

Before Gardner, Chief Judge, and Woodrough and Van Oosterhout, Circuit Judges.

Gardner, Chief Judge.

Appellants Oliver Marbs and Emil Sarkis with one William C. Schulze were indicted on an indictment containing three counts. The first count charged appellants Marbs and Sarkis with offering a bribe to a United States Internal Revenue Agent, the second count charged appellants Marbs and Sarkis with giving such brige to said agent, while the third count charged Marbs, Sarkis and Schulze with conspiring to offer and give such bribe. At the close of the government's testimony the government dismissed Count I of the indictment as to appellant Sarkis alone.

At the close of all the testimony each of the appellants and the defendant Schulze moved for judgment of acquittal, which motions were denied. The jury found appellant Marbs guilty as charged on all three counts, appellant Sarkis guilty on Counts II and III, and defendant Schulze guilty on Count III of the indictment. After verdict each of the defendants moved for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial. These motions too were denied and judgment and sentences were thereupon entered pursuant to the verdicts of the jury.

The defendant Schulze has not appealed. The appellants have filed separate briefs. Appellant Marbs seeks reversal on the ground of entrapment. Appellant Sarkis seeks reversal on substantially the following grounds: (1) the court erred in admitting evidence of acts and declarations of alleged co-conspirators and in failing to instruct the jury to disregard such testimony, and (2) the court erred in denying his motion for judgment of acquittal interposed at the close of all the evidence and his motion for judgment notwithstanding the verdict or in the alternative for a new trial.

In his brief appellant Marbs does not challenge the sufficiency of the evidence to warrant the jury in finding him

guilty as charged on all three counts of the indictment. He, however, contends that the court erred in its instructions to the jury on the question of entrapment. On the question of entrapment the court instructed the jury as follows:

> "Defendant Marbs in this case has claimed that he was entrapped into doing the acts charged against him. Entrapment is recognized as a valid defense available to a person charged with the commission of a public offense under certain circumstances.
>
> "If you find that a criminal design originated in this case, not with the defendants, but was conceived in the minds of the government witnesses, and the defendant Marbs was by persuasion, deceitful representation or inducement lured into the commission of a criminal act, then you should return a verdict of not guilty as to defendant Marbs. On the other hand, if you find that the criminal design, if there was one, originated with one or more of the defendants, then the defense of entrapment does not apply.
>
> "Defense of an unlawful entrapment has been claimed by defendant Marbs. The Government has the burden of proving beyond a reasonable doubt that there was not an unlawful entrapment."

It is contended by Marbs that although the evidence was sufficient to prove that the criminal design originated with him there was evidence warranting the jury in finding that he abandoned this design and that thereafter the government agents induced him to execute his original design. An examination of the objection to the instruction interposed reveals that the question now argued was not specifically raised by the objection interposed. Nothing in the objection suggests that the court omitted to instruct the jury on the question of appellant Marbs' alleged aban-

donment of his design. The objection contains the following words:

> "Defendants object to the giving of Government's Requested Instruction No. 4, on the grounds that that instruction eliminates the defense of entrapment, and even though the Court subsequently instructed the jury on the defense of entrapment that particular portion was omitted from this instruction which is in effect a verdict directing instruction on Count Two of the Indictment.
>
> * * * * * * *
>
> "The defendant Marbs will also object to the giving of the instruction on entrapment, it was unnumbered, because the instruction is inadequate to completely cover the defense particularly in that it excludes the application of entrapment on a certain contingency stated in the instructions, which contingency in and of itself is not sufficient to render the defense non-applicable."

Just what may have been in the mind of counsel in interposing the objection that "the instruction is inadequate to completely cover the defense particularly in that it excludes the application of entrapment on a certain contingency stated in the instructions, which contingency in and of itself is not sufficient to render the defense non-applicable" is not apparent. Rule 30, Federal Rules of Criminal Procedure; **McDonough v. United States**, 8 Cir., .. F. 2d ..; **McKenna v. United States**, 8 Cir., 232 F. 2d 431; **Armstrong v. United States**, 8 Cir., 228 F. 2d 764; **Schuermann v. United States**, 8 Cir., 174 F. 2d 397. Rule 30 of the Federal Rules of Criminal Procedure, supra, in part provides that:

> "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects

thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This objection certainly did not call to the attention of the court nor opposing counsel that the instruction was objectionable because it did not cover the possibility that the appellant Marbs after having originated the criminal design may have repented. It is to be observed too that no instruction was requested specifically covering the question of alleged abandonment of his original criminal design. Conceding that "no specific case in point can be offered to the Court in support of appellant's contention", he cited the following authorities as enlightening by way an analogy: **Sorrells v. United States**, 287 U. S. 435; **Butts v. United States**, 8 Cir., 273 F. 35; **Newman v. United States**, 4 Cir., 299 F. 128. Since the case was submitted appellant Marbs calls our attention to the recent case of **United States v. Klosterman**, 3 Cir., 248 F. 2d 191, and great reliance is placed on this decision. The case is very readily distinguishable in its facts from the instant case. For instance, the issue presented in **United States v. Klosterman**, supra, is stated by the court as follows:

> "* * * whether the criminal intent proceeded from government agents or whether these agents simply afforded opportunities to those already disposed to the alleged criminality."

Conceding that the issue of entrapment is usually a jury question the court states that the question becomes one of law where the evidence points to only one conclusion. In the course of the opinion it is said, inter alia:

> "The inordinate amount of persuasion of Deeney by King indicates two elements in this case. It clearly discloses that Deeney was sincere in his attempt to abandon his original plan. It shows also that the crim-

inal design and intent for the commission of the actual bribery **originated not with him, but rather with the government agents who engineered the persuasion and solicitation.**" (Emphasis supplied.)

Again, the court said:

> "We do not think that the degree of persuasion is significant where the first approach is made by the agent of the law to an apparently innocent man."

It is very clear that the criminal design in **United States v. Klosterman,** supra, originated not with the defendant but with the government agents. After defendant there had been induced to enter the scheme by government agents he then attempted to withdraw. In the instant case, however, there is nothing to indicate that the original criminal design was that of the government agents and, as heretofore noted, it is conceded that the testimony was sufficient to warrant the jury in finding that the criminal design originated with appellant Marbs and we must assume that the jury so found. Neither is there any evidence supporting the contention that Marbs repented or by act or deed indicated that he had abandoned his original criminal design. It was he who delivered the bribe money, which he had presumably secured from appellant Sarkis, to the government agent. We think the court's instruction here challenged correctly stated the applicable law. The authorities cited by appellant Marbs are not to the contrary.

It is to be noted, too, that Marbs was convicted on Count I of the indictment of offering a bribe to an Internal Revenue Agent. There is not a scintilla of evidence indicating that he was entrapped into committing this offense; neither was there any evidence tending to show that he was entrapped into conspiring to offer the bribe as charged in Count III of the indictment upon which he was con-

victed and as one sentence was imposed against him on all counts, which sentence was within the maximum permissible for any of the separate counts and as the conviction was clearly sustainable as to Counts I and III, the judgment should be affirmed. **Hansbrough v. United States**, 8 Cir., 156 F. 2d 327. While the evidence in this case does not sustain the defense of entrapment the unseemly zeal with which the government agents sought to encourage defendants to pay a bribe is not to be commended.

Appellant Sarkis by various motions laid the foundation for challenging the sufficiency of the evidence to sustain the verdict as to him. As the jury found in favor of the government we must view the evidence in a light most favorable to the government as the prevailing party. The government is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven and if when so viewed the evidence was such that reasonable minds might differ then the question as to the guilt or innocence of defendants was one of fact to be decided by the jury and not one of law to be determined by the court. **Connelly v. United States**, 8 Cir., ... F. 2d ...; **Brennan v. United States**, 8 Cir., 240 F. 2d 253; **Peters v. United States**, 8 Cir., 160 F. 2d 319. There is no material dispute in the evidence as appellants offered no evidence.

Appellant Sarkis' income tax returns for the years 1952 and 1953 were being investigated by Internal Revenue agents. Internal Revenue Agent Brown was assigned to investigate these tax returns and on October 26, 1954, called Sarkis to arrange an interview. In response to this request for an interview Sarkis, accompanied by one Benny Moran, an accountant, called at Internal Revenue Agent Brown's office to discuss the returns questioned. During the conference Brown requested that Sarkis allow him to examine the contents of his safety deposit box. The request was granted and two days later Sarkis showed

Brown the contents of the safety deposit box. Some two months later Brown was approached by appellant Marbs, a former Internal Revenue Agent, who informed Brown that he was to represent appellant Sarkis in his tax matters and asked Brown what would be necessary to bring the examination to a hurried close. Brown replied that anything pertinent to the tax items in the years involved, plus signed net worth statements, would be helpful. Marbs said he would see what could be done about it. On March 1, 1955, Brown saw Marbs and asked if he had obtained the information desired and Marbs replied that he had not and that in all probability he would not obtain the information as he felt that Brown was just "fishing". Two days later Brown was approached by defendant Schulze, an Internal Revenue Agent, who inquired whether Brown was working on a case in which Marbs was interested. Schulze told Brown that Marbs had inquired as to the possibility of closing the case by accepting the return as filed and further stated, "I asked Ollie what was in it for Brown, and he said five hundred". Schulze further stated to Brown, "Five hundred dollars would make a nice down payment on a new automobile, ought to think it over". Following this conversation Brown reported the incident to his supervisor whereupon the matter was taken up with the Intelligence Division.

On March 22, 1955, Brown was again approached by Schulze who asked if he had given further consideration to the matter they had discussed. Schulze stated to Brown that he (Schulze) was not going to have anything more to do with the transaction but that if Brown wished to pursue it further he would have Marbs call Brown at a later time. On May 16, 1955, Brown called the home of Sarkis. Sarkis was not at home at the time but Brown left his telephone number and later that day Sarkis called Brown. Brown asked Sarkis whether Moran or Marbs was representing him and Sarkis said: "Well, I will let you know."

The following day Marbs called Brown and stated that he was representing both Emil Sarkis and his brother, Raymond Sarkis. On May 24, 1955, Brown and Marbs met and Marbs stated that although he was representing both Emil and Raymond Sarkis at present he was desirous of closing only the case of Emil Sarkis. Brown stated to Marbs that he could probably arrange a "No Change" report if he so desired. Brown was told by Marbs that the money had been placed in a safe of a friend of Marbs and Sarkis, and that when Brown mailed the "No Change" letter to Sarkis, Sarkis would call this friend and he in turn would call Marbs to pick up the money and turn it over to Brown. On May 25, 1955, Marbs again arranged to meet Brown and did so on the morning of May 26th on a street near the Federal Building. Brown there stated that Schulze had been the only one who had mentioned a fixed amount of money for filing the "No Change" report. Marbs there stated that the amount for doing that would be $500.00. On June 3, 1955, Brown arranged to mail the "No Change" report to Sarkis and on June 7th mailed the report as agreed. Brown was not immediately paid for mailing the report and there were several conversations between him and Marbs. On June 13, 1955, Marbs called Brown and told him to call Sarkis who in turn would call Marbs who could then get a release on the money for payment of Brown. Brown then called the home of Sarkis on June 13, 1955, but Sarkis was not there. Later Sarkis called Brown and the following conversation took place:

"Brown: Brown speaking.
"Party Calling: Hello, Mr. Brown?
"Brown: Yes.
"Party Calling: This is Sarkis.
"Brown: Emil?
"Party Calling: Yes, sir.
"Brown: How are you?

"Party Calling: All right. How are you?

"Brown: I was just wondering, did you ever get that 'No Change' letter? I mailed that.

"Party Calling: Yes, I got it a couple of days ago, Mr. Brown.

"Brown: I talked to Marbs. He didn't get an O. K. to release that money.

"Party Calling: That what?

"Brown: I thought—were you going to call Marbs?

"Party Calling: I'll get ahold of Marbs. I'll see what he—I'll talk to him.

"Brown: O. K. Then you'll call Marbs?

"Party Calling: Right. Is he home now?

"Brown: I talked to Marbs about fifteen, twenty minutes ago, I think. He was at home.

"Party Calling: O. K. I'll call him there.

"Brown: All right.

"Party Calling: Fine."

Later on the same day Marbs called Brown and arranged to meet him on the following day. On the next morning, June 14, 1955, Marbs called Brown and arranged to meet him at a street corner near the Federal Building. Marbs appeared at the appointed place and handed Brown an envelope containing $400.00, explaining that the additional $100.00 previously agreed to would be paid to Brown at a later date.

From these undisputed facts and circumstances could the jury reasonably infer that in offering and in giving a bribe to Brown, Marbs was representing Sarkis? Sarkis knew that his tax returns for the years in question were being seriously investigated. At the first conference between Sarkis and Brown, Brown asked to examine Sarkis' safety deposit box. After a two day delay Brown examined the contents of the box, with what result is not disclosed by the record, but the two days elapsing between

the request and the examination, of course, gave ample opportunity to remove from the box anything of an incriminating nature. Some considerable time later Marbs met Brown and asked him if he was examining Sarkis' income tax returns, and on being advised by Brown that he was, Marbs inquired what information would be necessary to close out the examination of the returns. Brown suggested that he furnish anything pertinent to the tax items for the years involved and that signed net worth statements by Sarkis would be helpful. Sometime later Brown was called upon by defendant Schulze who inquired whether Brown was working on a case in which Marbs was interested, and on being advised that he was, told Brown that Marbs had inquired as to the possibility of closing the case by accepting the returns as filed and that, "I asked Ollie what was in it for Brown and he said five hundred." Schulze further stated to Brown, "Five hundred dollars would make a nice down payment on a new automobile, ought to think it over." This apparently was the first suggestion of bribery and Brown immediately reported the matter to his superior. Some two weeks later Schulze again approached Brown and asked if he had given further consideration to the matter they had discussed. At that time Schulze stated to Brown that he was not going to have anything more to do with the transaction but that if Brown wished to pursue it further he would have Marbs call Brown at a later time. In these circumstances Brown called Sarkis and inquired whether Marbs or Moran represented him. Sarkis did not directly answer the question but said, "Well, I will let you know," and, apparently agreeable to Sarkis' promise to let Brown know who represented him, Marbs called Brown on the following day and reported that he was representing Sarkis. A few days later Brown and Marbs met and at that meeting Marbs suggested that if a "No Change" letter were mailed to Sarkis, Sarkis would call a friend who

would release money for payment of Brown. At a subsequent meeting Brown advised Marbs that Schulze had mentioned a fixed amount in regard to filing the "No Change" report and Marbs definitely stated that the amount for doing this would be $500.00. As the money promised was not presently forthcoming Brown telephoned Sarkis, whom Brown had reason to believe under the circumstances was the person for whose benefit the transactions were being negotiated and who presumably was the source from which the money would be forthcoming, and inquired whether he had received a copy of Brown's favorable report and on being advised that it had been received Brown said that he had talked to Marbs and that Marbs had apparently not received "an O. K. to release that money." Thus, Sarkis knew that Marbs had promised on his behalf money for a favorable report. The money had not been paid at this time. Sarkis made no protest with deference to the money transaction but instead said, "I'll get ahold of Marbs." The jury might well have inferred that he succeeded in getting hold of Marbs, as later the same day Marbs called Brown and arranged to deliver the bribe money the following day and this was done. Sarkis knew that Marbs was claiming to represent him, he knew that Marbs on his behalf had promised a bribe to Brown, he made no protest nor denial of Marbs' authority to represent him, and the money was actually paid by Marbs. From the undisputed facts and surrounding circumstances we think the jury was warranted in inferring that Marbs in all these transactions was representing Sarkis and that Marbs, with Sarkis' money and with Sarkis' acquiescence and consent, paid Brown money intended as a bribe.

Appellant Sarkis cites a number of authorities which are readily distinguishable in their facts from the instant case. It is his contention that the evidence is insufficient

to warrant the jury in finding Sarkis guilty on the conspiracy count and relies strongly on what is said by us in **Egan v. United States**, 8 Cir., 137 F. 2d 369. In that case we said, inter alia:

> "Where the accused is not in some * * * interested relation to the conspirators * * * mere knowledge * * * will be insufficient, in the absence of some word or deed, to connect him with the conspiracy. On the other hand * * * if he has some interest in the success of the conspirators * * * if the conspirators inform him of their plan and keep him advised of the steps taken by them to attain their purpose, and he by his approval stimulates their activities * * * then a jury upon evidence of such facts would be warranted in finding him guilty."

In the instant case, manifestly the activities were for the benefit of Sarkis since they were calculated to clear him of tax liability and, as already stated, his knowledge and participation in the events was a reasonable inference for the jury to make from the record presented. Neither does the decision in **United States v. Carengella**, 7 Cir., 198 F. 2d 3, support counsel's contention. In that case a tavern owner received stolen liquor from a person and arranged to pay for it a few days later. At the appointed time the defendants came to get the money. The Court of Appeals reversed the lower court on this record because there was nothing to connect the defendants with the illegal sale transaction. In the instant case, however, Sarkis was not some outsider. The sole object of the conspiracy and the bribery was to aid him. Further, the conversation between Sarkis and Brown, together with the subsequent events, offer a reasonable basis for the conclusion of knowledge on the part of Sarkis. This was the missing element in the cited case. On this phase of the case we conclude that the evidence, if admissible, was sufficient to sustain the verdict.

It is contended that the court erred in admitting extra-judicial acts and declarations of Marbs and Schulze as against Sarkis. These conversations have already been set out in the course of this opinion. The objection was that they were hearsay as to Sarkis. They were hearsay unless a conspiracy existed among the defendants, and these so-called acts and declarations occurred during the existence of the conspiracy and in furtherance of its purposes. If a conspiracy existed there can be no doubt that these acts and declarations were in furtherance of its purposes, so we may confine our consideration to the sufficiency of proof to warrant the jury in finding that a conspiracy existed. If a conspiracy existed then the acts and declarations of any conspirator were admissible as to all conspirators. We think the two conversations between Brown and Sarkis heretofore discussed in this opinion were a sufficient foundation to warrant admission of other evidence of conspiracy. When Sarkis was questioned by Brown with reference to the payment of money promised by Marbs his reaction was not one of repudiation, but he said he would get hold of Marbs. This, in effect, was a ratification of Marbs' acts rather than a repudiation, and it is significant that Marbs proceeded to carry out the scheme of bribery of which Sarkis had been given notice by Brown. Proof of a conspiracy to commit a crime is rarely susceptible of direct evidence, but it may be established, as any other fact, by circumstantial evidence reasonably warranting an inference. In **Galatas v. United States**, 8 Cir., 80 F. 2d 15, we considered the question of the sufficiency of the evidence to sustain a finding by the jury that a conspiracy to commit a crime had been proven. In that case we collated many of our own decisions on this question. In the course of the opinion we said:

> "Conspiracy is rarely susceptible of direct and positive proof, but it may be proven by circumstantial evidence. **Goode v. United States** (C. C. A. 8), 58 F.

(2d) 105, 107; **Cooper v. United States** (C. C. A. 8), 9 F. (2d) 216, 224; **Smith v. United States** (C. C. A. 8), 157 F. 721, 728; **Feigenbutz v. United States** (C. C. A. 8), 65 F. (2d) 122, 124.

"In **Goode v. United States**, supra, it is said: 'The agreement need not be in any particular form, but it is sufficient that the minds of the parties met understandingly. A mutual implied understanding is sufficient so far as the combination or confederacy is concerned; and, in fact, the agreement is generally a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. It is not necessary to prove that the defendants actually agreed in terms to adopt the unlawful purpose and to pursue it by common means. A conspiracy is rarely susceptible of proof by direct evidence, but must be proved by circumstantial evidence. It may be deduced from the conduct of the parties and the attending circumstances.'

"In **Cooper v. United States**, supra, it is said, concerning the offense of conspiracy: 'It is practically always established by circumstantial evidence, and this method in no sense amounts to the building of one presumption upon another.'

"In **Smith v. United States**, supra, it is said: 'The effects and results of a conspiracy can be observed and proved, but rarely can one get a glimpse or make proof of the secret conferences which inaugurate it. For these manifest reasons proof of a criminal combination to do an unlawful act can rarely be made except by light reflected from its consequences or results.'

"In **Feigenbutz v. United States**, supra, this court, speaking through Judge Van Valkenburgh, said: 'Conspiracy is an offense which can ordinarily be estab-

lished only by a great number of apparently disconnected circumstances. Necessarily the existence of the conspiracy in most cases can be made to appear only inferentially from the acts of the parties committed in furtherance thereof.'

"If the evidence is as consistent with the innocence of the defendants as with their guilt, of course, no conviction can properly be had. **Langer v. United States** (C. C. A. 8), 76 F. (2d) 817. This court is not charged with the duty of considering conflicts in the evidence, credibility of witnesses, the plausibility of explanations offered by defendants, or the weight of the evidence. Its sole function in this regard is to determine whether there is substantial evidence to support the verdict. **Cravens v. United States** (C. C. A. 8), 62 F. (2d) 261; **Burton v. United States**, 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; **Smith v. United States** (C. C. A. 8), 50 F. (2d) 46; **Webster v. United States** (C. C. A. 8), 59 F. (2d) 583. The jury having found the defendants guilty, that view of the evidence and the inferences reasonably to be drawn therefrom must be taken which is most favorable to the government. **Zottarelli v. United States** (C. C. A. 6), 20 F. (2d) 795. Overt acts of the parties may properly be considered with other evidence and attending circumstances, in determining whether a conspiracy exists, and where the overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged. **Safarik v. United States** (C. C. A. 8), 62 F. (2d) 892; **Rand v. United States** (C. C. A. 8), 77 F. (2d) 53.

"In **McDonnell v. United States** (C. C. A. 1), 19 F. (2d) 801, 803, speaking of the sufficiency of the evi-

dence to connect a defendant with a conspiracy, the court approved an instruction which said: 'It is enough if a man, understanding that there is a crowd banded together to break the law, knowing in a general way what the purposes of the crowd are in that respect, becomes a member of it and acts with them to a greater or lesser extent.'

"In the instant case, the evidence, including the attending circumstances, all points to the irresistible conclusion that the defendants knew the purpose of all this activity with reference to the custody and apprehension of Nash. These activities could have had but one purpose and object—the escape of the prisoner, Frank Nash."

In **Phelps v. United States**, 8 Cir., 160 F. 2d 858, we said:

"Such a joining of intentions into a conspiracy may, and ordinarily only can, be established by inference from evidence of relationships and conduct and other probative circumstances."

See also **Martin v. United States**, 10 Cir., 100 F. 2d 490; **Quirk v. United States**, 8 Cir., 161 F. 2d 138; **United States v. Pagano**, 2 Cir., 224 F. 2d 682. In **Martin v. United States**, supra, referring to the sufficiency of proof to establish a conspiracy to commit a crime the court among other things said:

"The agreement need not be in any particular form. It is enough if the minds of the parties meet and unite in an understanding way with the single design to accomplish a common purpose, and the union of the minds may be proved by circumstantial evidence. The agreement may be inferred from statements, acts, and circumstances. It is frequently not susceptible of direct proof."

In **United States v. Pagano**, supra, Judge Medina, speaking for the court on the question of the sufficiency of the evidence to prove a criminal conspiracy, among other things, said:

> "It is elementary that no direct proof of agreement is essential in these conspiracy cases and that the evidence taken as a whole is the proper basis for the drawing of the necessary inferences."

In the instant case the court meticulously instructed the jury relative to the character of evidence admissible to establish the conspiracy charged. We conclude that considering all the facts and surrounding circumstances and considering the evidence on the issue as a whole it was sufficient to warrant the jury in drawing the inference that the defendants conspired and agreed together to commit the offense of bribery as charged in the third count of the indictment. It follows that there was no error in overruling the objections of appellants to admitting into evidence the extra-judicial acts and declarations of defendants Marbs and Schulze, nor in not striking them from the record, nor in not instructing the jury to disregard them.

We have considered all other contentions urged by the appellants and think them wholly without merit. The judgments appealed from are therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15736 September Term, 1957.

Friday, December 27, 1957.

Emil Sarkis, Appellant,

vs.

United States of America.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Emil Sarkis, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

December 27, 1957.

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FILED
MAR 17 1958
JOHN T. FEY, Clerk

No. 793

In the Supreme Court of the United States

OCTOBER TERM, 1957

EMIL SARKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
[illegible],
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Department of Justice, Washington 25, D. C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17–34) is reported at 250 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1957 (Pet. 35). A petition for rehearing was denied on January 20, 1958. The petition for a writ of certiorari was filed on February 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of petitioner's participation in a conspiracy

with his accountant to bribe an Internal Revenue agent investigating petitioner's tax returns to justify admission against petitioner of statements made by the accountant and to support petitioner's conviction.

2. Whether petitioner was entitled to acquittal on the ground of entrapment.

STATUTES INVOLVED

18 U. S. C. 201 provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such

thing or imprisoned not more than three years, or both.

This section shall not apply to violations of section 212 of this title.

18 U. S. C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U. S. C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Petitioner was convicted under counts 2 and 3 of an indictment returned in the United States District Court for the Eastern District of Missouri (R. 117–118). Count 2 charged petitioner and one Marbs with bribing an Internal Revenue agent investigating petitioner's tax liability, and count 3 charged petitioner, Marbs, and Schulze with conspiracy to offer and give such bribe (R. 2–4). Petitioner was given concurrent sentences of 18 months' imprisonment (R. 113–114).

On appeal (R. 115–116), the judgment was unanimously affirmed (Pet. 35).

Pertinent evidence adduced at the trial may be summarized as follows:

Internal Revenue agent Brown was assigned to investigate petitioner's income tax returns for 1952 and 1953 (R. 13, 17). In response to a call from Brown, on November 2, 1954, petitioner appeared with his accountant, Mr. Moran, and for about an hour discussed his tax liability with Brown (R. 17–18). Petitioner agreed to allow Brown to examine his safe deposit box. This was done two days later on November 4 (R. 18, 35).

On February 1, 1955, defendant Marbs, a former Internal Revenue agent, told Brown that he was to represent petitioner in the examination of petitioner's tax file, and asked what would be necessary to bring it to an early closing. Brown replied that anything pertinent to the tax items for the years involved and signed net worth statements would be helpful, and that he would see what could be done about it (R. 18–19). On March 3, Brown was approached by defendant Schulze, an Internal Revenue employee, who said that Marbs had asked about the possibility of closing the case by accepting the return as filed. Schulze said, "I asked Ollie [Marbs] what is in it for Brown, and he said five hundred." Schulze stated to Brown, "Five hundred dollars would make a nice down payment on a new automobile, ought to think it over " (R. 21, 46, 47). On March 14, Brown reported this incident to his supervisor after which the matter was referred to the Intelligence Division (R. 21).

On May 16, 1955, Brown telephoned petitioner's home for the purpose of reopening the tax examination, and left his telephone number for petitioner to call back. When petitioner returned the call, Brown asked whether Moran or Marbs was representing him, and petitioner stated, "Well, I will let you know" (R. 22, 23, 34). On May 17, Marbs called Brown and stated that petitioner had informed him that he (Marbs) was going to represent petitioner (R. 22, 24, 34, 40). On May 20, Marbs called Brown, who stated that he wanted to know definitely who was to represent petitioner, since a different accountant (Moran) had appeared with petitioner at the first meeting. Shortly after this, Marbs called back to state that he had conferred with petitioner, and that he was to represent both petitioner and petitioner's brother in the tax examination (R. 24, 25, 40). At a meeting on May 24, Marbs told Brown that, although he was representing both petitioner and his brother, he (Marbs) was desirous of closing only petitioner's case at that time. Brown stated that he could probably arrange a "no change" report[1] if Marbs so desired. Marbs told Brown that the money had been placed in the safe of a mutual friend of Marbs and petitioner, and that when Brown mailed the "no change" letter to petitioner, petitioner would call the friend, who would in turn authorize Marbs to pick up the money and turn it over to Brown (R. 26, 40, 41).

[1] Brown testified that a "no change report is mailed to the taxpayer after a closed examination informing him that there has been no change of tax liability as to a deficiency or overassessment" (R. 26).

On May 25, 1955, when called by Marbs, Brown stated that he, together with other government agents, had prepared a "no change" letter. Brown said he requested that it be given to him rather than to petitioner so that he could effect the simultaneous exchange of the letter for the money. Marbs promised that he would discuss this with petitioner. When Brown called back later that evening, Marbs stated that he had arranged a meeting with petitioner at nine o'clock the next morning, and that he would meet Brown an hour later (R. 27–28). At the meeting on the morning of May 26, Marbs told Brown that he had been unable to talk to petitioner, and therefore did not have any money with him. Brown stated, "Well, the only person to date who has made mention of a specific sum of money has been Mr. Schulze. However, I presume it is a fixed amount." Marbs then stated that the amount would be $500 (R. 28).

On June 2, Brown called Marbs to say that if petitioner would call and tell Brown personally to drop the "no change" report in the mail, this would be done. In a return call, Marbs stated that petitioner did not feel that this was in accordance with the agreement and wanted Brown to mail the report without petitioner calling (R. 28–29).

On June 3, Brown called Marbs, stating that if petitioner wanted the report mailed, he (Brown) would drop it in a mail box designated by Marbs, meet Marbs there, and collect the money upon mailing the report. Marbs thought this would be agreeable, and said he would discuss it further with petitioner (R.

29). On June 7, when Brown called Marbs, Marbs announced that petitioner was not happy with Brown's proposal and wanted the report mailed as agreed. Later that afternoon Brown mailed the "no change" report, and called Marbs to say that he should inform petitioner that he would receive it the next day (R. 29, 42, 65).

On June 8 and 9, Marbs told Brown that he had not contacted petitioner. On June 10, Brown called Marbs and told him that unless the matter were closed by the following Monday, June 13, he was going to conduct a real examination of petitioner's tax returns. Marbs stated that, although he had been unable to reach petitioner, he was sure he could contact him over the weekend (R. 29–30, 42, 44, 57–59, 53).

On June 13, since petitioner had returned from out of town, Marbs called to suggest that Brown call petitioner who could in turn call Marbs to give an "okay" for payment of the money to Brown (R. 30). Brown called petitioner's home (R. 59–60, 53) and when petitioner returned this call the following conversation occurred (R. 31, 60, 53–54):

> BROWN: Brown speaking.
> PARTY CALLING: Hello. Mr. Brown?
> BROWN: Yes.
> PARTY CALLING: This is Sarkis.
> BROWN: Emil?
> PARTY CALLING: Yes, sir.
> BROWN: How are you?
> PARTY CALLING: All right. How are you?
> BROWN: I was just wondering, did you ever get that no change letter? I mailed that.

PARTY CALLING: Yes, I got it a couple of days ago, Mr. Brown.

BROWN: I talked to Marbs. He didn't get an O. K. to release that money.

PARTY CALLING: That what?

BROWN: I thought—were you going to call Marbs?

PARTY CALLING: I'll get ahold of Marbs. I'll see what he—I'll talk to him.

BROWN: O. K. Then you'll call Marbs.

PARTY CALLING: Right. Is he home now?

BROWN: I talked to Marbs about fifteen, twenty minutes ago, I think. He was at home.

PARTY CALLING: O. K. I'll call him there.

BROWN: All right.

PARTY CALLING: Fine.

Later that afternoon (June 13), Marbs called Brown to say that he would meet him the following day, and "this time there would be no mixups" (R. 32, 61, 54).

On June 14, Marbs called Brown to arrange a meeting on a street corner in downtown St. Louis. Marbs appeared at the appointed place and handed Brown an envelope containing $400. Marbs explained that the payment was $100 short, since petitioner needed this money for a son graduating from the eighth grade, and that petitioner would pay the other $100 at a later date (R. 32–33, 62–63). When Brown asked Marbs about the tax examination for petitioner's brother, Marbs stated that "the same deal could be worked out there" (R. 33). Marbs was arrested after payment of the bribe (R. 64–67).

The case was submitted to the jury on the theory that petitioner's participation in the conspiracy oc-

cured, if at all, on or after May 16, 1955, *i. e.*, when Brown asked petitioner who was representing him (R. 101, 105).

ARGUMENT

1. Petitioner attacks the sufficiency of the evidence to support his conviction, arguing that there was insufficient evidence of his participation independent of statements made by Marbs to Brown to justify admission of statements by Marbs against him, and that without such statements the evidence is insufficient to support his conviction. The evidence, other than statements by Marbs, however, amply justifies the conclusion of the jury that petitioner, after May 16,[2] participated in a conspiracy to bribe Brown so as to render the acts and statements of Marbs admissible. And, together, the admissible evidence establishes guilt beyond a reasonable doubt.

Petitioner knew his returns were under investigation when on May 16, 1955, Brown asked petitioner whether Marbs represented him. Petitioner said he would let Brown know. Thereafter petitioner never took steps to repudiate Marbs as his representative. Rather, in the telephone conversation of June 13, 1955 (R. 60), the day prior to payment of the bribe, petitioner revealed his knowledge and demonstrated his

[2] Since the case was submitted to the jury on the theory that petitioner's participation dated from May 16, 1955, petitioner's objection (Pet. 13–14) to the remarks by the Court of Appeals as to the two-day delay in examining the safety deposit box in November, 1954, are irrelevant to the issue. Actually, all that the Court of Appeals noted was that the request to examine the box put the petitioner on notice that his returns were being seriously considered.

participation in the plan which Marbs had been effectuating. In that conversation petitioner made no denial to Brown that Marbs was representing him, and expressed no disavowal of the arrangement for payment of the money. Instead, petitioner promptly stated that he would call Marbs. There is a reasonable inference that he did so and directed Marbs to pay, since Marbs delivered the bribe money the next day. All this was independent evidence admissible to show the nature of the conspiracy and petitioner's participation. It was more than sufficient to justify admission against petitioner of evidence as to the statements of Marbs in promising to pay and paying money to Brown.[3] Petitioner was thus properly convicted of conspiracy and of aiding and abetting the substantive offense.

2. Petitioner's contention, that upon the basis of his telephone conversation of June 13, 1955, with agent Brown (R. 60) he was entitled to acquittal on the ground of entrapment, is without substance. At that

[3] It was not incumbent upon the government to show that petitioner was not in fact entitled to the "no change" report, as petitioner suggests (Pet. 12–13). The crime was complete upon a showing of payment of the bribe to agent Brown with intent to influence his decision upon a matter pending before him in his official capacity, and with intent to influence him to do an act in violation of his official duty. It was immaterial whether the "no change" report would be of actual benefit to petitioner. Cf. *United States* v. *Troop*, 235 F. 2d 123, 124–125 (C. A. 7); *Kemler* v. *United States*, 133 F. 2d 235, 238 (C. A. 1). There is, moreover, nothing in the record to indicate, as petitioner intimates (Pet. 13), that the accountant Marbs unscrupulously used part of his fee from petitioner to bribe Brown without petitioner's knowledge so as to avoid extensive work.

time the bribery plan was not just beginning (as petitioner's argument implies), but was already well on its way toward completion. The arrangements had long since been made and petitioner had already received the favorable "no change" report in accordance with Brown's part of the agreement. The only action remaining was for petitioner to authorize Marbs to pay the bribery money to Brown. Petitioner's complaint really is that the telephone call foiled his careful plan to keep his personal participation as covert as possible. That does not constitute entrapment.

The entrapment argument, moreover, is an afterthought. Although counsel for Marbs urged entrapment and the court instructed as to this subject on his behalf, counsel for petitioner did not request a specific entrapment instruction for petitioner (R. 100–101, 106). Where an accused does not defend upon entrapment or offer instructions on this defense, he may not raise it for the first time on appeal. *E. g., United States* v. *Ginsburg,* 96 F. 2d 882, 885–886 (C. A. 7), certiorari denied, 305 U. S. 620; *Hale* v. *United States,* 149 F. 2d 401, 403 (C. A. 5), certiorari denied, 326 U. S. 732. See Rule 30, F. R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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